

83 - 646
No.

Office - Supreme Court, U.S.
FILED

OCT 11 1983

ALEXANDER L. STEVENS,
CLERK

IN THE
Supreme Court of the United States
October Term, 1983

RAYMOND SUAREZ,
Petitioner,
vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

FREDERICK P. HAFETZ
GOLDMAN & HAFETZ
500 Fifth Avenue
New York, New York 10110
(212) 719-5100
Attorneys for Petitioner

Question Presented

Did the prosecutor's summation, which argued without evidentiary basis a key witness' fear of petitioner and made the prosecutor an unsworn witness on this subject, deny petitioner a fair trial?

TABLE OF CONTENTS

	PAGE
Question Presented	I
Table of Authorities	IV
Opinion Below	1
Jurisdiction	2
Constitutional Provision	2
Statement of the Case	3
Reasons for Granting the Petition	4
Conclusion	7
Appendix	
Judgment Order of the United States Court of Appeals for the Third Circuit	1a
Order Extending Time to File Petition for Writ of Certiorari	3a
Court Ruling on Holland Testimony	4a
Excerpts from Government's Rebuttal Summation	5a

TABLE OF AUTHORITIES

PAGE

Cases:

Berger v. United States, 295 U.S. 78 (1935)	4, 5, 6
United States v. Check, 582 F.2d 668 (2d Cir. 1978)	5
United States v. Cirillo, 468 F.2d 1233 (2d Cir. 1972)	5

Other Authorities:

U.S. CONST., amend. V, Section 3	2
18 U.S.C. Section 371	2
28 U.S.C. Section 1254(1)	2
A.B.A. Prosecution Standards, Standard 5.9	6

No.

IN THE
Supreme Court of the United States
October Term, 1983

RAYMOND SUAREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE
UNITED STATES AND ASSOCIATE JUSTICES OF THE
UNITED STATES SUPREME COURT

The petitioner, Raymond Suarez, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment and opinion at Number 82-3451.

Opinion Below

The opinion of the Court of Appeals, which has not yet been reported, was filed on July 18, 1983. It is reproduced at 1a.*

* References are to pages of the appendix annexed to the petition.

Jurisdiction

Petitioner was convicted on a one count indictment charging a conspiracy in violation of Title 18 U.S.C. Section 371 after trial by jury in the Middle District of Pennsylvania.

Petitioner was sentenced to a two year prison term and fined \$5,000. The sentence has been stayed by the trial court until October 24, 1983.

The judgment below (1a-2a), affirming the judgment of conviction, was filed on July 18, 1983.

An order (3a) was entered on September 7, 1983, by Mr. Justice Brennan as Circuit Justice, extending the time within which to file this Petition up to and including October 16, 1983.

This Court's certiorari jurisdiction is established by 28 U.S.C. Section 1254(1).

Constitutional Provision

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall be . . . deprived of life, liberty, or property without due process of law."

Statement of the Case

Petitioner and two co-defendants, Grasso and Passanisi, were tried on a charge of conspiracy to defraud an insurance company. The government theory at trial was that Passanisi, an owner of goods, employed Grasso, a trucker, to feign a hijacking of Passanisi's goods which Grasso had picked up at a warehouse managed by petitioner and falsely report to Passanisi's insurer that the goods had been stolen. All three defendants were convicted at trial.

The government's principal witness at trial was Mary Carter, Grasso's girlfriend. In crucial testimony against petitioner she testified that on the day of the feigned hijacking, she had observed Grasso hand Suarez a bag of cash which Grasso had obtained earlier that day from Passanisi.

After these events and prior to any testimony or interview by a government agent about them, Carter dictated to her friend Holland a detailed four-page letter narrating the events on the day in question which was introduced by the government at trial as a prior consistent statement. This letter contained no mention of Grasso giving money to Suarez. There was no testimony by Carter that the reason for this significant omission was fear of Suarez or of anyone else nor was there any testimony by her about fear of Suarez. After the government introduced testimony by Holland, over petitioner's objection, that Carter claimed the need to dictate the letter because "her life was in danger", the court struck this testimony (4a).

In summation, counsel for Suarez focused a major portion of his attack upon Carter's credibility on the significant

absence in the Carter letter of any observation of Grasso giving money to Suarez. In its rebuttal summation the government attempted to answer petitioner's contention by attributing it to fear by Carter, and then criticizing defense counsel for not cross-examining her on the reason for this alleged fear (5a-6a).

Petitioner objected to these comments and moved for a mistrial on the basis of them. The court sustained the objection although denying the mistrial motion. However, the court sustained the objection not on the grounds that the argument was improper, but on the inaccurate grounds that the argument had already been made in the prosecutor's initial summation.

Reasons for Granting the Petition

In *Berger v. United States*, 295 U.S. 78, 88 (1935) this Court stated:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Argument more prejudicial to a defendant than references to a claim of defendant's threats to a witness' safety is difficult to conceive. Although such evidence may in some circumstances have relevance that outweighs its prejudice and thus renders it admissible, admission of such evidence must be carefully scrutinized. See *United States v. Check*, 582 F.2d 668 (2d Cir. 1978). Here, the prosecutor's comments in summation implying that petitioner had instilled fear in a crucial government witness were "foul" blows depriving petitioner of a fair trial. *Berger, supra* at 88.

In summation, petitioner argued that the omission by Carter, the principal government witness, in a four-page narrative letter about the events in question, of a significant event about which she testified at trial—that Grasso gave petitioner a bag of cash on the day in issue—had severely impeached her credibility. There was no evidence at trial that the reason for this omission was fear of petitioner. Nor was there any evidence at trial of fear by Carter of petitioner. Although the person to whom Carter had written this letter had testified that Carter was in "fear for her life" at the time of this letter, the government did not offer that testimony as relevant evidence to explain the omission in the letter [compare, *United State v. Cirillo*, 468 F.2d 1233 (2d Cir. 1972)], and that testimony was struck from the record by the court. Indeed, the context in which the letter was written—privately dictated by Carter to her friend with the intent that it be turned over to the government only if something happened to her—made clear that rather than deliberately withholding information in the letter, Carter's intent was to narrate in the letter the major events of the day in question.

In the total absence of any testimony that the crucial omission in the Carter letter was attributable to fear of petitioner, the prosecutor nonetheless, in attempting to respond specifically to petitioner's argument on this omission, attributed it to fear of petitioner.

Compounding the prejudicial and non-existent fear of Suarez that he thus injected into the trial by these improper comments, the prosecutor then argued in summation—in the specific context of responding to petitioner's summation argument about the letter—that defense counsel had not “cross-examined one question about her testimony that she was afraid” (6a). Here, not only was the prosecutor erroneously and in direct contradiction to the record implying that Carter had explained the crucial omission in the letter by fear testimony, but beyond this, he made himself an unsworn witness by implying that he knew facts which the jury did not on this prejudicial subject. In so doing, the prosecutor violated the widely accepted ABA Prosecution Standards, Standard 5.9, which states:

“It is unprofessional conduct for the prosecutor intentionally to refer to or argue on this basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common knowledge based on ordinary human experience or matters of which the court may take judicial notice.”

In sum, this petition raises the issue of the limits of prosecutorial conduct in closing argument. In *Berger*, *supra*, this Court articulated the principle fundamental to our criminal justice system that while the prosecutor may fight hard, he may not strike “foul” blows. The prosecu-

tor's conduct here transgressed the limits of fairness in such a prejudicial manner as to deprive petitioner of the fair trial guaranteed him under due process of law.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

FREDERICK P. HAFETZ
GOLDMAN & HAFETZ
500 Fifth Avenue
New York, New York 10110
(212) 719-5100
Attorneys for Petitioner

October 6, 1983

APPENDIX

**Judgment Order of the United States Court of
Appeals for the Third Circuit**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-3451

UNITED STATES OF AMERICA

v.

RAYMOND SUAREZ,

Appellant

(Criminal No. 81-108-01—M.D.Pa. Scranton)

District Judge: Honorable R. Dixon Herman

Submitted Under Third Circuit Rule 12(6)

July 14, 1983

Before: SEITZ, *Chief Judge*, SLOVITER, *Circuit Judges*,
and LORD, *District Judge*.*

After consideration of the contentions raised by appellant, to-wit, that (1) the evidence was insufficient to prove beyond a reasonable doubt the guilt of defendant Suarez, (2) prosecutorial misconduct in connection with erroneously admitted but stricken fear testimony denied defendant Suarez a fair trial, (3) defendant Suarez adopts all arguments that will be raised by co-defendant Passanisi in his

* Joseph S. Lord, III, Judge of the United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

appeal from the judgment of conviction which are as follows:

(1) the guilty verdict was patently against the weight of the evidence, (2) the prosecutor's summation was improper and denied appellant a fair trial, (3) the court's alibi charge was reversible error, (4) the court below erred in denying the motion for a new trial on the ground that the prosecutor failed to disclose evidence important to his defense, (5) the trial court erred in denying, without an evidentiary hearing, the motion for a new trial because of newly discovered evidence that (a) shortly before trial, the prosecution's chief witness, Mary Carter, was seen shooting at a photograph of defendant Grasso and (b) shortly after trial, she shot and killed him in cold blood, (6) the cumulative impact of the errors complained of here requires reversal, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court

/s/ SEITZ

Chief Judge

ATTEST:

/s/ SALLY MRVOS

Sally Mrvos, Clerk

Dated: July 18, 1983

Certified as a true copy and issued in lieu
of a formal mandate on August 9, 1983.

Test: /s/ SALLY MRVOS
Clerk, United States Court of Appeals
for the Third Circuit

**Order Extending Time to File Petition for
Writ of Certiorari**

SUPREME COURT OF THE UNITED STATES

No. A-167

RAYMOND SUAREZ,

Petitioner,

v.

UNITED STATES

UPON CONSIDERATION of the application of counsel for
petitioner,

IT IS ORDERED that the time for filing a petition for writ
of certiorari in the above-entitled cause be, and the same
is hereby, extended to and including October 16, 1983.

/s/ WILLIAM J. BRENNAN, JR.

Associate Justice of the Supreme
Court of the United States

Dated this 7th
day of September, 1983

Court Ruling on Holland Testimony

The Court: Ladies and gentlemen of the jury, I was going to charge you at the time that you go out to the jury room—and I probably will again—but I wanted to tell you that the reading of the letter by Mrs. Holland is not substantive evidence. The testimony as to what happened, according to Mary Carter, was given from Mary Carter. This letter was read—and this is a rule of evidentiary law—to show that at an early time she made statements fairly consistent with what she said on the stand. There are some differences, I'm sure you'll find, and that is to rehabilitate a witness is the intention to show that she said those things, if she did, long before she came in here to testify.

The statements of Mrs. Holland, outside of the letter that she said, I am striking that from the evidence. And you will entirely disregard what she said about Mary Carter when she wrote the letter for her. I have stricken that from the record.

Excerpts from Government's Rebuttal Summation

. . .

The other area where the government was challenged to answer a specific question had to do with Mary Carter, had to do specifically with the Diane Holland letter which you have, it is Government Exhibit No. 27 and you will have an opportunity to look at it during your deliberation.

Why Mr. Hafetz asked didn't Mary Carter include in her letter that she dictated to Diane Holland the statement that I saw Burt hand Ray the bag of money. Mary Carter answered that, she said that she gave Diane Holland that letter in case something happened to her. Please remember Mary Carter's testimony and please remember all of Mary Carter's testimony.

She dictated that letter to Diane Holland at a time before she came up and appeared the first time before a grand jury. And you will remember that when she did come up and appear before a grand jury for the first time, she wouldn't answer any questions, she was of such a mind about providing any information about what she had witnessed that she was willing to go to prison for a week before she would provide any information about it.

She testified that the reason why she did not identify Joseph Passanisi as the third man there was out of fear. She testified that she had that letter prepared in case something happened to me.

The last thing that Mary Carter wanted to be was a witness in this proceeding. Her purpose in dictating that letter to Mary Carter—to Diane Holland—had nothing to do with trying to give a full statement of the facts relating to a matter involving an insurance fraud. The kind of testimony that she would give in a court of law with these three

defendants on trial, what she had in mind and what she wanted to accomplish when she dictated that letter was to have it down on paper what she had witnessed because she was afraid that something might happen to her. She had witnessed this, she was being subpoenaed to go appear before a grand jury, she was afraid.

You don't have any evidence on record of the basis for her fear. I said in my earlier argument—and I will say it again—that she was not cross-examined one question about her testimony that she was afraid. I think that's significant and I think the jury should consider why she wasn't asked.

Mr. Hafetz: I would object, this is improper rebuttal. It was for redirect examination for the government to bring that out, if it had the evidence.

The Court: That's right, I would sustain the objection. That's going beyond rebuttal, Mr. Smyser, because that was brought out on direct.

• • •